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No. 00-0034

In The

Supreme Court of the United States

GAMBLERS SUPPLY MANAGEMENT CO.
AND SODAK GAMING IOWA INC.,
A/K/A SODAK GAMING, INC.,

Petitioners,

v.

BYRON CLEMENTS AND MARK CLEMENTS,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates certain facts that are critical to this Court's analysis of the Question Presented.

First, Petitioners fail to adequately describe the nature of their business, which affects whether maritime law is even implicated in this case. The primary business of Petitioners, collectively referred to herein as "Gamblers Supply," during the term of Byron and Mark Clements' employment was to operate a casino. Due to restrictions in Iowa law, Gamblers Supply had to operate its casino in the form of a riverboat named the Miss Marquette with the requirement that the boat leave dock a certain number of times per year in order to maintain its gambling license.

Pursuant to the direction of the non-marine management of Gamblers Supply, the Miss Marquette did not leave dock any more than the minimum required trips per year. While the Miss Marquette did travel a few miles up and down the Mississippi River, it only docked in one place: Marquette, Iowa. The Miss Marquette did not board passengers at a port in any other state, nor did the Miss Marquette haul cargo or conduct other commerce from one state to another. Furthermore, the office of Byron Clements, as Director of Marine Operations, was not physically located on the Miss Marquette vessel.

The duties of Byron Clements, while including such tasks as being responsible "for the safe operation of a casino vessel to be docked in Marquette, Iowa, on the Mississippi River," also included responsibility for such non-maritime tasks as maintenance and cleaning of the

pavilion on land, staffing and scheduling of maintenance personnel, procurement and inventory management of maintenance supplies, and being the insurance claims coordinator. The duties of Mark Clements as Manager of Marine Operations included responsibility for such non-maritime tasks as staffing and scheduling maintenance and cleaning of the pavilion on land, staffing and scheduling of maintenance personnel, procurement and inventory management of maintenance supplies, and being responsible to the Director for the insurance claims program and budget.

Second, Petitioners mischaracterize the holding of the Iowa Supreme Court in this case, stating that it "held that even though maritime law applied, Iowa courts . . . could ignore existing federal maritime law on the issue." (Petition p. 7.) The Iowa Supreme Court did not ignore existing federal cases. Rather, it thoroughly analyzed the relevant decisions, recognized a split of authority in the federal courts, and followed the most recent federal court of appeals decision on point, *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993), *reh'g denied* (Feb. 23, 1993), *cert. denied*, 508 U.S. 981 (1993), a case which is consistent with a line of U.S. Supreme Court decisions holding that courts in admiralty cases can reach beyond maritime precedents and apply state laws to protect the welfare of seamen, absent a conflict with a fundamental tenet of admiralty law.

Third, Petitioners mischaracterize the applicability of two "of three decisions from Federal Courts of Appeals directly on point. . . . " (Petition p. 8.) Two of the three primary decisions relied on by Petitioners did not involve the assertion of *any* state law claims and did not discuss preemption in any way, shape or form. *See Feemster v. BJ-*

Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989) (declining to extend the holding of *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), to the facts of that case in which the plaintiff asserted a claim of wrongful termination under federal maritime law); *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 810 (5th Cir. 1990), *cert. denied*, 499 U.S. 907 (1991) (holding that the plaintiff had failed to prove up the 46 U.S.C. §2114 claim he had filed). Both the *Feemster* and *Garrie* decisions acknowledged the continued vitality of seaman wrongful discharge claims in the context of a personal injury. 873 F.2d at 94; 912 F.2d at 810 n.7.

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether the Iowa Supreme Court improperly interfered with the "uniformity" of federal maritime law when it followed the holding of *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993), *reh'g denied* (Feb. 23, 1993), *cert. denied*, 508 U.S. 981 (1993), and other federal decisions by remanding Byron and Mark Clements' retaliatory discharge claim to the trial court for consideration on the merits, rather than affirming dismissal pursuant to *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), *cert. denied*, 501 U.S. 1217 (1991).

Petitioners seek to foist on the Court the fiction that maritime law imposes a uniform rule prohibiting seamen[1]

[1] While the Iowa Supreme Court did not explicitly reach the issue of whether Byron and Mark Clements were "seamen" in its decision, Respondents have never conceded that they were

from asserting wrongful termination claims except in narrow circumstances. Contrary to Petitioners' assertions, the trend of decisions in federal courts, and in state courts under the "saving to suitors" clause of the Judiciary Act of 1789, makes clear that retaliatory discharge claims by maritime employees have vitality in a wide variety of situations, including the specific facts of this case. Also, a long line of Supreme Court decisions establishes that the need for a uniform maritime law leaves states a wide scope to provide state law remedies to seamen. Petitioners fail to cite, let alone attempt to explain, the most recent court of appeals decision on point, *Ellenwood*, which is directly contrary to their argument.

In a transparent attempt to grab the Court's attention, Petitioners argue that the Iowa Supreme Court

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seamen at the time of, and in relation to, termination of their administrative positions at Gamblers Supply Management Co. The Supreme Court in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S. Ct. 807, 818, 112 L. Ed. 2d 866 (1991), held that the question of who is a "member of a crew," and therefore who is a "seaman," is best characterized as a mixed question of law and fact. Various courts and commentators have noted the muddy waters with respect to the application of maritime law to riverboat casinos. *Moreno v. Grand Victoria Casino*, 2000 WL 521728 (N.D. Ill. 2000); *King v. President Riverboat Casino-Mississippi, Inc.*, 894 F. Supp. 1008 (S.D. Miss. 1995) (declining to find jurisdiction over riverboat patron's personal injury suit); Murky Liability Status sets Waterfront Gambling Adrift, 11/24/94 Nat'l L.J. at B1; *see also, Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982) (requiring sufficient nexus with traditional maritime activity). Nevertheless, even if we assume *arguendo* that Byron and Mark Clements were seamen, their claim of retaliatory discharge survives preemption.

"fail[ed] to recognize the binding nature of substantive maritime law. . . . " (Petition p. 8.) In reality, the Iowa Supreme Court's decision is consistent with the most current and widely adopted rulings of the federal courts. Thus, the Petition for Writ of Certiorari should be denied.

I. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE THE IOWA SUPREME COURT APPLIED WELL-SETTLED PRINCIPLES OF LAW AS SET FORTH BY THE U.S. SUPREME COURT IN *ASKEW V. AMERICAN WATERWAYS, AMERICAN DREDGING CO. V. MILLER* AND *YAMAHA V. CALHOUN* AND THE FIRST CIRCUIT COURT OF APPEALS IN *ELLENWOOD V. EXXON.*

A. The Iowa Supreme Court followed the most recent federal court decisions on the issue of whether maritime law preempts state claims for wrongful termination under the public policy exception to the employment-at-will doctrine.

Respondents respectfully address this Court on the single issue in this case: The preemptive effect of maritime law on wrongful discharge actions based on state law. Petitioners attempt to characterize the Iowa Supreme Court's decision as violating an alleged uniform rule of maritime law prohibiting claims by seaman for wrongful termination. Contrary to Petitioners' assertions, there is no uniform rule on this issue, and the majority of federal and state court decisions are unfavorable to Petitioners.

Byron and Mark Clements' state court petition at law (complaint) contained a single claim for relief (one count for each plaintiff) against Gamblers Supply alleging that

Gamblers Supply was liable under Iowa law for terminating the employment of Byron and Mark in retaliation for their refusal to violate federal safety laws. The district court granted Gamblers Supply's motion for summary judgment, ruling that maritime law preempted Clements' state law causes of action. The Iowa Supreme Court reversed and remanded for further proceedings to address the merits of Clements' state law claim.

The Iowa Supreme Court followed a line of federal decisions, including the most recent cases to address the issue of the preemptive effects of maritime law on state law claims for wrongful termination, *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993), *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), and *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1035 (E.D. Cal. 1995), in which it was held that such claims are not preempted. *See also, Higgins v. Smith Int'l Inc.*, 716 F.2d 278 (5th Cir. 1983), *disavowed on other grounds by Overman v. Fluor Constructors, Inc.*, 797 F.2d 217, 219 (1986).

In ruling against preemption, the First Circuit Court of Appeals in *Ellenwood* noted that the U.S. Supreme Court recently reiterated the longstanding principle that the historic police powers of the states are not to be superceded by federal act unless that course is "the clear and manifest purpose of Congress." *Ellenwood*, 984 F.2d at 1274 (citing, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. at 2716 (1992)). "Thus, the presumption is against preemption." *Ellenwood*, 984 F.2d at 1274.

In its analysis, the *Ellenwood* court also noted that "Supreme Court cases make it clear that courts in admiralty cases may reach beyond maritime precedents and apply

state laws 'absent a clear conflict with the federal [maritime] law'. " *Id.* at 1278 (quoting, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973)); *see also, American Dredging Co. v. Miller*, 510 U.S. 443, 447, 114 S. Ct. 981, 985, 127 L. Ed. 2d 285, 293 (1994). In addition, the court concluded that state human rights statutes may be applied in maritime cases.

> Indeed, it would be anomalous for maritime law, which has always shown "a special solicitude for the welfare of seamen and their families," *Miles*, 489 U.S. at 36, 111 S. Ct. at 327, to reject such an employee-sensitive provision. *See also, Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1063 (5th Cir. Unit A 1981) (noting "the admiralty courts' protective attitude towards the seamen"). " '[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy.' " [Citations omitted] (state law "is generally referred to only when it affords greater protection to maritime employees than that afforded by admiralty law").

Ellenwood, 984 F.2d at 1280-81.

State law is referred to by the courts when it "affords greater protection to maritime employees than that afforded by admiralty law." *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 6 n.1 (1st Cir. 1983), *citing, Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-11 (1953).

Moreover, under its exercise of maritime jurisdiction pursuant to the "saving to suitors" clause, the Iowa Supreme Court was correct in following *Ellenwood* and deferring to local policy. *See Fireman's Fund American Ins. Co. v. Boston Harbor Marina, Inc.*, 406 F.2d 917, 919, 921

(1st Cir. 1969); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *Alcoa S.S. Co. v. Charles Ferra & Co.*, 383 F.2d 46, 50 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968) (court may adopt state law by reference or by virtue of the less developed nature of federal law); *Giglio v. Farrell Lines, Inc.*, 424 F. Supp. 927 (D.N.Y. 1977) (where clear precedent in the law of the sea are lacking, maritime law may look to the law prevailing on the land). Employment issues have not been fully developed in the maritime common law.[2] On the other hand, this cause of action is well developed on land.[3] The evolving status of the maritime common law of wrongful discharge is not, however, a valid reason to deny the existence of a cause of action. Furthermore, such a holding is inconsistent with the overriding maritime policy of protecting the seaman. *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782-83 (1952); *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d at 1063.

State substantive law has long played an important role in maritime matters, and "there are numerous instances in which the general maritime law has been

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[2] *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("To claim that all enforced rights pertaining to matters maritime are ruled in Federal Law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in the regulation of maritime commerce."); *cf., Kelley v. Schlumberger Technology Corp.*, 2 IER Cases 126 (D. Mass. 1987), *affirmed*, 849 F.2d 41 (1st Cir. 1988).

[3] Virtually all but a handful of jurisdictions recognize a cause of action for wrongful discharge in violation of public policy. *Labor Relations Reporter: Individual Employment Rights Manual* (BNA) 505:51-52 (February 1992).

modified or supplemented by state action." 2 AM. JUR. 2D *Admiralty* §137 (1994).

The first Congress, in the Judiciary Act of 1789, set forth that the jurisdiction of the federal courts over claims in maritime and admiralty law to be exclusive, but saved to suitors in all cases "the right of a common-law remedy, where the common-law is competent to give it." 1 Stat. 76 §9 (currently located at 28 U.S.C. §1333). The language of the "saving to suitors" clause of the Judiciary Act of 1789 remained unchanged until 1948. 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION 3D §3672 n.2 (1998). At that time, the words "common law remedy" were removed, but the Supreme Court subsequently ruled that the new language would be interpreted the same as the old. *Madruga v. Superior Court of Calif.*, 346 U.S. 556, 74 S. Ct. 298 (1954); *see also* Revisor's Note to 28 U.S.C. §1333 (new language represented a stylistic preference).[4]

"With the saving clause, the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit." 2 AM. JUR. 2D *Admiralty* §121 (1994), *citing, Moore v. Purse Seine Net*, 18 Cal. 2d 835, *aff'd*, 318 U.S. 133, *reh'g denied*, 318 U.S. 801.

> It is in the very nature of the saving clause that if it is otherwise applicable, a proceeding in a state court cannot be objected to on the ground that the cause of action is maritime in character.

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[4] The saving to suitors clause was amended again in 1949, but the amendment merely changed the phrase "libellant and petitioner" to the word "suitor" as was used in the original Judiciary Act. Act of May 24, 1949, c. 139, §79, 63 Stat. 101.

> Because of that clause, a federal admiralty court and a state court may have concurrent jurisdiction.
>
> §122. Proceedings in personam as within savings clause
>
> State remedies in personam are generally within the scope of the "saving to suitors" clause. An example of a claim within the "savings to suitors" clause is an action in personam to recover damages for a tort, which is the most familiar type of exercise of the jurisdiction of state courts under the saving clause.

2 AM. JUR. 2D *Admiralty* §§121-22 (1994).

Congress provided no federal remedy for marine employees who are terminated for refusing to violate the law in the absence of a report of the law violation to the Coast Guard prior to the termination. Nor did Congress expressly preempt state law remedies for those persons.

A good example of the role state substantive law has played in maritime matters is the application of state laws for wrongful death and survival actions in maritime accident cases.[5] A recent U.S. Supreme Court case, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), provides an apt illustration. In that case, Yamaha moved for a partial summary judgment against the plaintiff, arguing that the federal maritime law for a wrongful death action the Supreme Court recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375

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[5] The *Ellenwood* court also examined the history of maritime wrongful death actions to illustrate the leading role state law sometimes plays in maritime cases. 984 F.2d at 1280.

(1970), provided the exclusive basis for a recovery, displacing all remedies afforded by state law. The Supreme Court rejected Yamaha's argument, holding "that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action. . . . " *Id.*, 133 L. Ed. 2d at 583.

Because the case involved a watercraft collision on navigable waters, it fell within admiralty's domain. " 'With admiralty jurisdiction,' we have often said 'comes the application of substantive admiralty law.' " *Id.* at 585 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)). "The exercise of admiralty jurisdiction, however, 'does not result in automatic displacement of state law.' " *Yamaha*, 133 L. Ed. 2d at 585 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995)). "Indeed, prior to *Moragne*, federal admiralty courts routinely applied state wrongful death and survival statutes in maritime acts and cases." *Yamaha*, 133 L. Ed. 2d at 586. The *Yamaha* court noted that *Moragne* "centered on the extension of relief, not on the contraction of remedies" and "notably left in place the negligence claim [Moragne] had stated under Florida's law." *Id.*, 133 L. Ed. 2d at 590-91.

The Supreme Court further stated that the need for a uniform federal maritime law "still leaves the States a wide scope." *Id.* at 588 n.8; *see also, American Dredging Co.*, 510 U.S. at 451-52, 114 S. Ct. at 987, 127 L. Ed. 2d at 296. The Court refused to precisely delineate that scope, stating that "it would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence." *Yamaha*, 133 L. Ed. 2d at 588 n.8.

In the context of wrongful death actions involving maritime employees, the courts have applied the various state wrongful death and survival laws since at least 1907, *see e.g., The Hamilton*, 207 U.S. at 398, to supplement maritime law. In the more recently developed area of claims of wrongful termination, cases such as *Ellenwood v. Exxon Shipping Co.* and *Higgins v. Smith Int'l, Inc.* have allowed former employees in maritime businesses to pursue claims under state law.

Petitioners in the present case rely on *Feemster v. BJ-Titan Services Co./Titan Services, Inc.*, 873 F.2d 91 (5th Cir. 1989), *Garrie v. James L. Gray, Inc.*, 912 F.2d 808 (5th Cir. 1990), and *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), in an attempt to demonstrate that the Iowa Supreme Court's decision ignored substantive maritime law.[6] Petitioners' reliance is misplaced. *Feemster* and *Garrie* are inapposite to the facts of the present case. The claims of Messrs. Feemster and Garrie, unlike the claims of Byron and Mark Clements, had been based solely on *federal* maritime law. Clements recognized that they might not be able to state a claim under federal law, and their petition at law set forth only a state law claim.

The *Ellenwood* case, which is more recent than the *Feemster* and *Garrie* cases, recognizes a wrongful termination claim under *state* law.[7] The *Ellenwood* decision is

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[6] It is important to note that none of these cases cited by Gamblers Supply involve a passenger vessel such as the Miss Marquette in which the public safety concerns are as great and the state's police powers are as strongly implicated.

[7] "[W]e reverse the district court's ruling . . . that plaintiff's claim of violation of state public policy is similarly preempted,

consistent with the practice of courts in admiralty allowing the expansion and supplementation of maritime law with state law claims where maritime law does not itself provide a remedy. *See* 2 AM. JUR. 2D *Admiralty* §121 (1994).

Petitioners implicitly resort to the doctrine of "field preemption," under which "preemption may be inferred because 'the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Petitioners seek to avoid undertaking an inquiry into the pervasiveness of federal maritime regulation under the Judiciary Act. Instead, they rely on *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), which held that federal maritime law did occupy the field of employment rights to the exclusion of state law remedies.

Meaige held, in a summary fashion, that it was important "to recognize the exclusive nature of federal admiralty law" and that "[u]niformity of application throughout the nation is a central purpose and feature of this exclusive jurisdiction." *Id.* at 702. The *Meaige* opinion is flawed by what it did *not* say. First, there was no attempt to identify any indication that Congress intended to preempt state causes of action. Second, in expanding the scope of the preempted field, the court gave no effect to, and ignored, the presumption against preemption. Third, the court gave no explanation or authority for its proposition that imposing liability for damages in a tort

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and the case is therefore remanded for further proceedings on such claims. . . . " *Ellenwood*, 984 F.2d at 1287.

lawsuit is equivalent to state legislative or administrative regulation for purposes of preemption. Fourth, the court failed to explain the need for uniform remedies for plaintiffs in different parts of the country. *See Ellenwood*, 984 F.2d at 1279: "Once again, however, Exxon heralds the need for uniformity without an appreciation for the boundaries of its relevance."

> As we observed in *Carey*, "the Supreme Court . . . no longer construes the Admiralty Clause as requiring 'rigid national uniformity in maritime legislation.' " 864 F.2d at 207 (citation omitted). *See also Lyon v. Ranger III*, 858 F.2d at 27; G. Gilmore & C. Black, *The Law of Admiralty*, at 49-50 (2d ed. 1975). In other words, a state law claim should not be dismissed simply because it would result in differing remedies for plaintiffs in different parts of the country; such a claim is foreclosed only if the state law in question frustrates a fundamental tenet of admiralty law.

Ellenwood, 984 F.2d at 1279. Yet another defect in *Meaige* was its almost comical reference to "a body of federal maritime jurisprudence relating to wrongful discharge. . . . " *Meaige*, 925 F.2d at 703. The "body" of jurisprudence the *Meaige* court referred to was a single case that declined to create a federal cause of action for wrongful discharge, *Feemster v. BJ-Titan Services Co./Titan Services*, 873 F.2d 91 (5th Cir. 1989), and one other case that *did* create a federal cause of action for wrongful discharge, albeit in the personal injury context. *Smith v. Atlas Off-Shore Boat Serv.*, 653 F.2d 1057 (5th Cir. 1981). It is important to realize that the sole case that the *Meaige* court relied on to support its holding as part of this

"body" of case law, *Feemster*, did not involve the assertion of *any* state law claims and did not discuss preemption in any way, shape or form.[8]

During the years following the *Meaige* decision, the U.S. Supreme Court has addressed the question of preemption of state tort causes of action. *See, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996). These decisions clearly demonstrate that *Meaige* was incorrectly decided. *Meaige* was on the wrong track, and Petitioners follow it to their peril.

In the present case, the Iowa Supreme Court correctly followed federal precedent in remanding Clements' claim to the trial court for a decision on the merits. Accordingly, the Petition must be denied.

B. Federal and state court decisions have permitted seamen to assert wrongful termination claims in a variety of situations, and the Iowa Supreme Court followed the trend in the law protecting seamen from wrongful termination.

1. Respondents have a valid retaliatory discharge claim under the facts of this case.

Courts, both state and federal, have held that claims under state law relating to wrongful discharge are not preempted by federal maritime law in a variety of situations.

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[8] *Feemster* involved a request "to create a private right of action under general maritime law. . . . " *Feemster*, 873 F.2d at 92.

In the leading case of *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), the Fifth Circuit recognized a maritime common law cause of action for wrongful discharge. Since the case was one of first impression, the Court turned to the non-maritime common law of wrongful discharge for guidance. *Smith*, 653 F.2d at 1060. The Court found it:

> particularly appropriate in light of the admiralty court's protective attitude towards the seaman. The judiciary's leading role in fashioning controlling rules of maritime law and in reshaping old doctrine to meet changing conditions makes the admiralty court peculiarly sensitive to the inequities inherent in the traditional rule. Moreover, this type of cause of action is not without federal precedent.

Smith v. Atlas Off-Shore, 653 F.2d at 1063.

Similarly, in *Higgins v. Smith Int'l Inc.*, 716 F.2d 278 (5th Cir. 1983), the court applied state law to the claim by a former offshore oil rig employee for breach of an employment contract in the context of a personal injury claim under the Jones Act and in admiralty.

The trend started by *Smith v. Atlas Off-Shore* and *Higgins v. Smith Int'l* to allow seamen to assert state law claims for wrongful termination was continued by *Ellenwood v. Exxon Shipping Co.*, 948 F.2d 1270, 1278 (1st Cir. 1993), which found "no 'clear and manifest' intent on the part of Congress to preempt state handicap discrimination claims . . . " and held that "[o]ur preemption analysis applies as well to Ellenwood's claim for wrongful discharge based on public policy." Not only did the court of appeals not find a "clear and manifest" intent on the part

of Congress to preempt such claims, but also, it did not even find "signals of such an intent." *Id.*

Another example is *Borden v. Amoco Coastwise Trading Company*, 985 F. Supp 692 (D.C. Tex. 1997), in which the captain of an ocean tug was terminated because he refused to sail in the face of two storms on two different occasions. The captain sued the employer for wrongful discharge, claiming that if he would have sailed the tug, he would have violated 46 U.S.C. §10908, which prohibits sending an unseaworthy vessel to sea that will endanger lives. The district court held that although admiralty law governed the wrongful discharge claim, Texas employment law may also be applicable to the extent it was not inconsistent with admiralty principles, and under maritime law, an exception to the employment-at-will doctrine exists when the employee's termination violates clearly important public policy.

The state court case of *Baiton v. Carnival Cruise Lines, Inc.*, 661 So.2d 313 (Fla. Ct. App. 1995), provides useful analysis of federal maritime cases dealing with wrongful termination. In *Baiton*, an employee sued Carnival, his maritime employer, for retaliatory discharge under federal maritime law and under Florida's whistle-blower statute, alleging that the discharge was motivated in substantial part by the employee's refusal to give a false statement in a personal injury action against the maritime employer. The court held that the employee had a cause of action for retaliatory discharge, and federal maritime law relating to retaliatory discharge did not preempt the state whistle-blower statute.

Carnival argued that the case facts fell under *Feemster v. BJ-Titan Services Co./Titan Services*, 873 F.2d 91 (5th Cir. 1989), and *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991) (which disallowed wrongful termination claims), and not under *Smith v. Atlas Off-Shore Boat Serv.*, 653 F.2d 1057 (5th Cir. 1981) (which allowed a seaman to assert a retaliatory discharge claim), because Baiton's claim was factually distinguishable from *Smith* on the basis that *Smith* is confined to allowing a wrongful termination claim for a plaintiff who is discharged for filing a personal injury action.

The court held that Baiton's cause of action was not precluded by *Feemster* and *Meaige*, stating that the facts fell under the *Smith* case, because allowing retaliatory discharge would constitute an abuse of the employer's right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy. *Baiton*, 661 So.2d at 315.

In the present case, Byron and Mark Clements filed a petition (complaint) against Gamblers Supply and its parent company Sodak Gaming alleging that their employment was terminated because they refused to violate federal safety regulations, including violations that may have affected the very stability and seaworthiness of the Miss Marquette Riverboat and the safety of its passengers. (A. 3.) For purposes of this appeal, Petitioners have conceded that Iowa law recognizes a cause of action for termination of an employee in a manner that offends against public policy, and that the refusal of an employee to violate federal law would be contrary to public policy. (A. 9.)

The facts of the present case fit squarely into the majority rule of the federal courts allowing seamen to assert wrongful termination claims when their termination violates a clear public policy. No rule of maritime law is contradicted by the Iowa Supreme Court's decision in the case at bar, and thus, the Petition must be denied.

2. 46 U.S.C. §2114 provides an *additional* remedy for seamen under certain circumstances, and it does not limit the right of Respondents to seek relief under other theories of liability.

Petitioners assert that 46 U.S.C. §2114 (protection of seamen against discrimination)[9] creates additional requirements and a "condition precedent" for seamen to assert claims of retaliatory discharge, specifically that the seaman must report, or be about to report, a violation of law to the Coast Guard. (Petition p. 25.) Petitioners further claim that the Iowa Supreme Court created an exception to the requirements of 46 U.S.C. §2114 by allowing a state law claim of retaliatory discharge without Byron and Mark Clements first contacting the Coast Guard. (Petition p. 26.) Petitioners' argument misses the boat.

Respondents concede that to pursue a claim under 46 U.S.C. §2114 it is necessary that a seaman must have contacted or be about to contact the Coast Guard to report the violation of law. However, §2114 is irrelevant to this case, because Respondents have never asserted a

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[9] Petitioners incorrectly reference the statute as being located in Title 42 instead of Title 46 of the United States Code. (Petition p. 25.)

claim under that statute. In addition, the statute exists to provide seamen an *additional* remedy, not to eliminate other remedies under state or federal common law. *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1034-35 (E.D. Cal. 1995) (In circumstances in which §2114 provides no remedy, general maritime law provides a wrongful termination cause of action, because discharge of a captain for refusing to pilot a vessel that he reasonably believes is unseaworthy violates public policy). No part of §2114 expresses an intent on the part of Congress to preempt state law claims, and no state or federal cases cited by Petitioners have suggested that the trend started in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), to provide a remedy for retaliatory discharge was altered by the later passage of §2114 in 1984.

Several cases have allowed seamen to pursue retaliatory discharge claims under the common law and/or state statutory law, even though the seamen could not necessarily satisfy the elements of §2114. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993); *Borden v. Amoco Coastwise Trading Company*, 985 F. Supp 692 (D.C. Tex. 1997); *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp 1029 (E.D. Cal. 1995); *Baiton v. Carnival Cruise Lines, Inc.*, 661 So.2d 313 (Fla. Ct. App. 1995). Likewise, Respondents in the present case must be allowed to pursue a claim of wrongful termination under the public policy exception to the employment-at-will doctrine as the Iowa Supreme Court correctly decided, and the Petition must be denied.

CONCLUSION

The "saving to suitors" clause of the Judiciary Act of 1789, a long line of U.S. Supreme Court cases recognizing that "courts in admiralty cases may reach beyond maritime precedents and apply state laws 'absent a clear conflict with the federal [maritime] law,' " and several decisions of state and federal courts provide a firm basis for former maritime employees to assert *in personam* claims for wrongful termination under state law even in circumstances in which federal maritime law does not itself provide a remedy. Such state law claims are not preempted by maritime law regardless of whether or not the employment was related to traditional maritime commerce. In addition, there is a disputed issue as to whether Clements' employment with Gamblers Supply was sufficiently related to traditional maritime commerce to even implicate maritime law.

Petitioners fail to advance any significant or substantial reason for review. The Iowa Supreme Court properly applied well-settled principles regarding state law remedies for maritime employees. Review by the Supreme Court will not fulfill any of the requirements or

goals of Rule 10(b), and the petition for review should be denied.

Respectfully submitted,

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